

APR 18 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES ODRA SMITH,

Petitioner - Appellant,

v.

D. ADAMS, Warden,

Respondent - Appellee.

No. 05-16283

D.C. No. CV-02-06124-LJO

MEMORANDUM^{*}

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, Magistrate Judge, Presiding

Argued and Submitted April 6, 2006
San Francisco, California

Before: SCHROEDER, Chief Judge, TROTT and KLEINFELD, Circuit Judges.

California state prisoner James Odra Smith appeals the district court's
dismissal as untimely of his § 2254 petition on remand from this court.

^{*} This disposition is not appropriate for publication and may not be
cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Smith claims that California’s time limits are not comparable to those held to be “filing conditions” in Pace v. DiGuglielmo¹ because California only requires that a petition be filed within a “reasonable period.” This argument is foreclosed by Circuit precedent.²

The language that the Tulare County Superior Court used to deny the petition is materially identical to the language that the Superior Court used in Bonner v. Carey.³ We held in Bonner that this amounts to a denial for untimeliness. Thus, under Pace v. DiGuglielmo,⁴ it was not “properly filed” for purposes of statutory tolling.⁵

Without the benefit of this statutory tolling, Smith’s petition is time-barred even if we were to grant him the equitable tolling to which he claims entitlement.

AFFIRMED.

¹ Pace v. DiGuglielmo, 544 U.S. ___, 125 S.Ct. 1807, 1814 (2005).

² Bonner v. Carey, 425 F.3d 1145, 1148 (9th Cir. 2005).

³ Id.

⁴ Pace v. DiGuglielmo, 544 U.S. ___, 125 S.Ct. 1807, 1814 (2005).

⁵ Pace v. DiGuglielmo, 544 U.S. ___, 125 S.Ct. 1807, 1814 (2005); Bonner v. Carey, 425 F.3d 1145 (9th Cir. 2005).